STATE OF MICHIGAN

IN THE SUPREME COURT

MICHAEL J. BARNES JR.,

Plaintiff - Appellee,

v.

KIM KRISTINE JEUDEVINE,

Defendant - Appellant.

_____/

Supreme Court No.: _____
Court of Appeals No.: 252840
Trial Court Case No.: F03-006657-DP

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APPELLEE'S RESPONSE TO APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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STANDARD OF REVIEW

Appellee agrees with Appellant that the Standard of Review for a motion for summary disposition is *de novo*. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999).

Appellee also agrees that whether a party has standing to bring an action is reviewed *de novo*. *In re KH*, 469 Mich 621, 627-628; 677 NW2d 800 (2004).

STATEMENT OF BASIS OF JURISDICTION

Appellee agrees with Appellant that this Court has jurisdiction of this Application for Leave to Appeal pursuant to MCR 7.301(A)(2).

QUESTION FOR CONSIDERATION

Appellee does not agree that Appellant's Statement of Question Involved accurately frames the issue this court should consider.

Appellee submits the following as the question this Court should consider:

> Is a child, born less than four months after the mother's marriage was terminated with a Judgment of Divorce which stated, "no children were born of this marriage and none are expected", a child "that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage," and, therefore, a "Child born out of wedlock," as defined by the Paternity Act, MCL 722.711(a)?

Appellee states:	Yes
Appellant states:	No
Trial Court stated:	No
Court of Appeals stated:	Yes

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BRIEF OF APPELLEE IN OPPOSITION TO APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

APPELLEE'S COUNTER STATEMENT OF FACTS

Appellant correctly states that Mr. James Vincent Charles and Appellant Kim Kristine Juedevine were wed on July 11, 1996. Mr. Charles filed for divorce, *In pro per*, in Ninth Circuit Court on July 9, 1998. The Complaint was personally served on Appellee August 12, 1998. (See Complaint for Divorce, attached as *Exhibit A*.)

Appellant alleges that prior to being served with the Summons and Complaint for Divorce she discovered she was pregnant. She also alleges that she never disclosed this fact to her husband, Mr. Charles. No court has ever stated these as findings of fact. Appellee lacks knowledge sufficient to admit or deny the allegations.

Appellant correctly states it is undisputed that the child was conceived during the marriage. However, Appellee does not know when Appellant discovered she was pregnant.

Appellant also correctly states that she never answered the complaint or appeared. Appellee lacks knowledge or information as to why Appellant did not answer the complaint or appear.

On October 1, 1998 an Affidavit, Non-Military Affidavit, and Default was entered in the divorce. Plaintiff Charles swore in the Affidavit that Appellant Mrs. Charles had not filed or served an Answer to the Complaint for Divorce or taken other action.

On October 8, 1998, Plaintiff Charles served Appellant Mrs. Charles with a Notice of Request for Judgment which indicated that the Request would be considered at a hearing November 2, 1998 in the 9th Circuit Court-Family Division.

On October 29, 1998 Plaintiff Charles filed a Proof of Service which indicated he had served Appellant with the Notice of Request of Judgment on October 8, 1998, and the Affidavit, Non-Military Affidavit and Default on October 14, 1998 via first class mail.

On November 2, 1998 the 9th Circuit Court-Family Division entered a Judgment of Divorce. Plaintiff Charles appeared *In Pro Per* and offered proofs. Appellant Mrs. Charles did not appear. The Judgment of Divorce provided, "it further appearing that no children were born of this marriage and none are expected." (See Judgment of Divorce attached as *Exhibit B.)*

Appellant correctly states that McClain Michael Barnes was born on February 26, 1999, and that Appellee alleges he is the biological father of McClain. Appellant has never denied that fact.

Appellee agrees that when McClain was born Appellant and Appellee both signed an Affidavit of Parentage indicating they are the parents of McClain (see Affidavit of Parentage, attached as *Exhibit C*); a Birth Certificate was also prepared that reflects that fact.

It is at this point in Appellant's Statement of Facts that counsel for Appellant arguably violates the spirit and letter of MRPC 3.3(a) and MCR 7.212(C)(6). He alleges that, "Under oath, it falsely avers that the "mother," i.e. the Appellant, was not married from the conception to the birth of the child." As Appellant, and Appellant's counsel know, the Affidavit of Parentage states, "Further, the mother states that she was not married when this child was born or conceived; or that this child, though born or conceived during a marriage, is not an issue of that marriage as determined by a court of law." It is the second clause of this sentence that gives rise to this case, not the first clause that Appellant quoted.

Appellant then alleges she signed the Affidavit under duress from the Appellee. This is simply not true. Both parties signed the Affidavit willingly and voluntarily. The Affidavit of Parentage contains the following statement above the parties' signatures: "In signing this form, we understand that: 1) Completion of the acknowledgment is voluntary." Moreover, the Affidavit states at the top that, "We affirm under penalty of perjury that we are the natural parents of . . . ."

The parties and their child, McClain Michael Barnes, continued to cohabit until the summer of 2003. Neither party ever sought an order regarding custody, parenting time, or support during the time of cohabitation. The parties eventually separated in the summer of 2003; Appellee had lived with his son nearly four and one-half years at the time of the separation. Shortly thereafter, Appellee initiated the proceedings that give rise to this appeal. Appellant has not allowed Appellee to see his son in approximately two years.

Appellant's statement of the procedural history of this case in the trial court and Court of Appeals is essentially accurate. The trial court's transcript speaks for itself.

Important facts to note:

1) Appellant did not contest the Complaint for Divorce which alleged she was not pregnant.

2) Appellant had received the Complaint for Divorce via personal service.

3) Appellant did not contest entry of the Judgment of Divorce.

4) Appellant voluntarily signed the Affidavit of Parentage which indicates Appellee is the father.

5) Appellant had a Birth Certificate prepared which identifies Appellee as the father.

ARGUMENT

A child born less than four months after the mother's marriage was terminated with a Judgment of Divorce which states, "no children were born of this marriage and none are expected," is a child "that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage, " and, therefore, a "child born out of wedlock," as defined by the Paternity Act, MCL 722.711(a).

The Court of Appeals correctly recognized that, "a default judgment is just as conclusive an adjudication and as binding upon the parties of whatever is essential to support the judgment as one which has been rendered following answer and contest." *Perry & Derrick Co v King*, Mich App 616, 620; 180 NW2d 483 (1970). See also *Schwartz v City of Flint*, 187 Mich App 191, 194; 466 NW2d 357 (1991). Moreover, the factual and legal components of default judgments must be respected like other judgments as a matter of policy. *Nederlander v Nederlander*, 205 Mich App 123, 126; 517 NW2d 768 (1994). "The rule is well established that courts speak through their judgments and decrees . . . . " *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977).

Appellant's argument grafts a new duty on courts to affirmatively confirm statements contained within Complaints and Default Judgments. This misses the point of a default; the defendant had an opportunity to contest the allegations in the complaint and chose not to. Imposing this duty on courts when the defendant did not exercise their right to contest issues is ridiculous. Appellant did not cite a legal authority for the idea because one does not exist.

Appellant's reliance on the analysis in *Girard v Wagenmaker*, 437 Mich 231, 420 NW2d 372 (1991) is misplaced. The Court of Appeals did not include it in its opinion because it is not analogous.

Appellant mischaracterizes the facts and analysis in *Dep't of Social Services v Baayoun*, 204 Mich App 170, 176; 514 NW2d 522 (1994). In that case the husband seeking the divorce *expressed no knowledge whether a pregnancy was in progress*, and the ensuing default judgment was then silent on the issue of paternity. Those facts are clearly different from the facts in the case at bar. Here, the husband affirmatively alleged in the Complaint for Divorce that, "The wife is not pregnant." And the ensuring Default Judgment of Divorce stated, "it further appearing that no

children were born of this marriage and none are expected."

The purpose of the Paternity Act is to provide support for illegitimate children. *Van Laar v Rozema*, 94 Mich App 619, 622; 288 NW2d 667 (1980).

Application of the statutory definition of "child born out of wedlock," to the facts at bar is very straight forward. Admittedly, Appellee cannot rely on the first prong of the definition. It is the second prong on which Appellee relies. In 1998 the 9th Circuit Court entered a Judgment of Divorce that declared there were no children of Appellant's marriage and none were expected. That same court has now decided that its own judgment is not a judicial determination. The decision flies in the face of the unambiguous statutory definition, rules of statutory interpretation, *supra*, and the plain intent of the Paternity Act, *supra*. The trial court should have concluded that its 1998 Judgment of Divorce was a determination that McClain Michael Barnes is not an issue of Appellant's marriage.

Appellant became pregnant by Appellee in 1998 while married to Mr. Charles. Mr. Charles obtained a Judgment of Divorce without objection from Appellant. The Judgment of Divorce clearly states that no children were born of the marriage and none were expected. In Michigan, courts speak through their orders and judgments. In short, that 1998 Judgment of Divorce represents a judicial determination of all issues contained within it. *Miskinis v Bement*, 325 Mich 404 (1949). Therefore, it was a judicial determination that McClain Michael Barnes was not an issue of that marriage.

Michigan courts are to interpret statutes according to the common and approved usage of the words within the statute. *Girard, 238-239.* Courts may also consider the intent of the statute. *Id.*. Here, the common and approved usage of the words is unambiguous. For Appellee to pursue a Paternity case, a court must have determined that McClain Michael Barnes was not the issue of

Appellant's marriage. The 9th Circuit Court did that when it entered the Judgment of Divorce in 1998.

The trial court's decision was inconsistent with not only the plain language of the Paternity Act, but also the intent of the Act; the intent of the Act is to provide support for illegitimate children. *Van Laar,* 622. This is what is most outrageous about the trial court's decision. In 1998 the court definitively determined that Appellant's then husband was not the legal father of McClain Michael Barnes. The trial court has now made it impossible for, not only Appellee, but anyone, to pursue paternity of McClain Michael Barnes. Therefore, the trial court has used the Paternity Act to virtually assure that McClain Michael Barnes will never have a legal father providing support for him.

It is not as if the trial court decided that Appellee is not the father and Mr. Charles is the father. The trial court's decision means that neither one is or will be McClain Michael Barnes' father. This would be troubling under any facts, but it is tragic when one considers that Appellant has never specifically denied that Appellee is the biological father of McClain Michael Barnes. It is essentially undisputed that Appellee is the biological father of McClain Michael Barnes.

WHEREFORE, Appellee respectfully requests that the Court of Appeals opinion is affirmed and this Court reinstate Appellee's Complaint for Paternity, and allow the case to proceed.

Dated: October 28, 2005

Respectfully submitted,

By: Jeffrey M. Gagie (P49822)
Attorney for Plaintiff - Appellee